INDEX

CITATIONS

Cases:

In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 664

ORLANDO DELLI PAOLI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (Pet. App. 13-27; R. 1026-1040) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on January 10, 1956 (R. 1041). The petition for a writ of certiorari was filed on February 3, 1956. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the evidence was sufficient to support petitioner's conviction for conspiracy to sell, and for selling, illicit alcohol.

2. Whether a post-conspiracy confession by a co-defendant conspirator, showing petitioner's guilt, was properly admitted in evidence where the court gave cautionary instructions that the confession was to be considered only in determining the guilt of the confessing defendant and not that of the other co-defendants (including petitioner).

STATEMENT

Petitioner and four co-defendants were convicted in the United States District Court for the Southern District of New York of conspiracy to sell illicit alcohol (R. 942, 970-972). Petitioner was sentenced to imprisonment for a period of two years (R. 965, 1002). On petitioner's appeal (R. 1012), his conviction was affirmed (R. 1041). Judge Learned Hand wrote the court's opinion, Judge Medina filed a concurring opinion, and Judge Frank dissented (Pet. App. 13-27).

The evidence, consisting for the most part of testimony by government agents who had observed the defendants' activities, may be summarized as follows:

On December 7, 1949, defendant Pierro and petitioner drove to a cottage at 1124 Harding Park in the Bronx, New York, and inspected a garage which was part of these premises (R. 23-24). Later, in the Tivoli Bar, Pierro, in the presence of petitioner and defendant Margiasso, had several

conversations with the owner about purchasing the Harding Park property (R. 80-83). On December 29, 1949, the sale was consummated, when Pierro's sister paid the $2,000 purchase price (R. 89, 92, 113-115). Thereafter, neighbors saw petitioner and Pierro a number of times on the premises at 1124 Harding Park. A woman living there introduced petitioner as her cousin (R. 540, 542, 548, 565).

On April 10, 1950, petitioner and Pierro drove to a parking lot where they inspected a Diamond T truck.[1] Two days later, a government agent saw it parked in front of 1124 Harding Park (R. 32-33). Pierro and another man were hammering and sawing in the garage (R. 33, 35, 48). Before the Harding Park garage had been purchased there were windows in it, but later these were boarded up or painted over (R. 94-95, 97, 557, 46).

On May 1, 1950, Pierro drove petitioner to 1124 Harding Park; from there, petitioner drove the Diamond T truck to a filling station for gasoline, and then parked it on a lot opposite his residence (R. 34-35, 43-44).

On December 3 and 4, 1951, the Diamond T truck was parked on the lot opposite petitioner's residence (R. 143-144, 247). On December 4, 1951, petitioner drove in his Cadillac from his home to 1124 Harding Park, backed his car toward the garage doors, and opened them (R. 144, 275, 444-445).

On December 10, 1951, petitioner and Margiasso

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[1] This truck was registered under a false name (R. 133, 207-208).

went to the lot opposite petitioner's residence, took from a Dodge truck several bundles of flat cartons, suitable for wrapping 5-gallon cans, and placed them in the Diamond T truck, which they drove to the Harding Park garage. After unloading the cartons and some furniture in the garage, they returned to petitioner's residence (R. 147, 445, 473-474, 581-586).

On December 18, 1951, after driving his Dodge car to the Harding Park garage, Margiasso went to a gasoline station at 1430 Bruckner Boulevard at 8:45 p.m. About 10 minutes later petitioner arrived at the station in his Cadillac. About 9:00 p.m., two men appeared in a Pontiac, which Margiasso alone drove away. After he returned, the two men left in the Pontiac which appeared to be "heavy loaded". The government agents following the car lost it because of icy roads (R. 396-401, 154-155, 590, 591-593). Later that night, petitioner's Cadillac and Margiasso's automobile were parked near the Tivoli Bar (R. 597).

On the evening of December 28, 1951, the most important date involved, government agents were observing the Bruckner Boulevard gasoline station, through field glasses (R. 159). At about 7:00 p.m., co-defendant King drove up in a Plymouth coupe and talked to Margiasso, who drove away in the Plymouth (R. 401-403, 599-601). Agents followed Margiasso to the garage at 1124 Harding Park where the garage doors and the trunk of the Plymouth were opened (R. 601-603). Shortly after Margiasso had left the gasoline station, peti-

tioner arrived there in his Cadillac and conversed with King, first while sitting in a parked Dodge car and later in the Cadillac (R. 403-404, 603-604, 159-160). Upon Margiasso's return with the Plymouth, he alighted and King drove it away (R. 405-406, 604, 161). The agents followed King, arrested him, and discovered 19 five-gallon cans of illicit alcohol in the car (R. 406-408, 604-606, 161-163).

At about 10:00 p.m. on December 28th, two men, one of whom was co-defendant Whitley, arrived at the gasoline station in a Pontiac, which Margiasso drove away, leaving the two men at the station (R. 409-410, 608, 168-169). The agents followed Margiasso to 1124 Harding Park, where they saw that the Pontiac was backing into the garage, the doors of which were opened (R. 410, 169). Margiasso was arrested and his keys were taken (R. 411, 610-611, 170, 451, 455-456). One of the keys fitted the ignition of the Diamond T truck parked opposite petitioner's home (R. 417-418), and another was for a lock on the garage door at 1124 Harding Park (R. 612). At the garage, 113 five-gallon cans of illicit alcohol were discovered (R. 416-417, 611-612, 171). At the gasoline station, Whitley was arrested, and about $1,000 was found in a paper bag he had with him (R. 179-180, 329).

On that same evening of December 28th, as the agents and the persons arrested were getting ready to proceed in two automobiles to the police station, petitioner drove his Cadillac into the gasoline

station. After an agent started talking to petitioner, he attempted to back the Cadillac out into the street. One agent drove his car to the rear of the Cadillac in order to stop it, and a police patrol car passing by blocked the other side of the Cadillac. An agent then entered the Cadillac and all parties proceeded to the police station (R. 180-181).

On January 5, 1952, Whitley went with his attorney to the offices of the Alcohol and Tobacco Tax Unit and signed a detailed confession (Pet. App. 24-27; R. 381-386). In the confession Whitley admitted that on several occasions he had made purchases of illicit alcohol from petitioner, and that Margiasso was also involved as the person who would drive Whitley's car to pick up the alcohol and return to the Bruckner Boulevard gasoline station (Pet. App. 25-26).

This confession was admitted in evidence over objection of all defendants with the exception of King, whose name was not mentioned in it (R. 388-391, 727-728). Petitioner's counsel assigned as a reason for his objection the fact that "reference is made to a person known as Bob when there has been reference in the trial that Orlando Delli Paoli has been known as Bobby London" (R. 391). When the confession was received in evidence, the court explained at length that it was to be considered by the jury only against the defendant Whitley (R. 734-735, 736). And in the final charge (R. 924, 928-929) the admonition was meticulously repeated. The court instructed (R. 928-929):

I have heretofore advised you in connection with the written statement of the defendant Whitley that it may be taken into consideration by you only in determining his guilt. Since the statement was made after the arrest, the statement may be evidence against him, but is not evidence against the other defendants, and therefore, your determination as to the guilt or innocence of the other defendants must be made on the other evidence without taking into account at all the statement signed by the defendant Whitley which was introduced in evidence.

ARGUMENT

1. Petitioner asserts (Pet. 8-10) that the evidence against him was insufficient since it disclosed, at most, suspicious conduct and fraternization or association with the other conspirators.

Although the evidence implicating petitioner in the conspiracy was circumstantial, participation in a criminal conspiracy need not be proved by direct evidence; the plan may be inferred from the attendant circumstances. *Glasser* v. *United States*, 315 U.S. 60, 80; *United States* v. *Manton*, 107 F. 2d 834, 839 (C.A. 2), certiorari denied, 309 U.S. 664. The totality of events shown by the evidence—covering a period of two years—was more than sufficient to warrant the jury's inference that petitioner was a member of the conspiracy. These events included petitioner's presence with Margiasso at the time Pierro was negotiating for

purchase of the Harding Park garage, used to store the illicit alcohol; petitioner's inspection of the garage site and appearance there on different occasions; his trips to and from the garage in the Diamond T truck; his conversations at the gasoline station with the purchaser King, while awaiting Margiasso's return with the contraband alcohol; and the attempted flight in his Cadillac at the time of apprehension.[2] As Judge Hand succinctly put it (Pet. App. 15): "The whole business was illegal and carried on surreptitiously; and the possibility that unless [petitioner] were a party to the venture, Pierro and Margiasso would have associated him to the extent we have mentioned is too remote for serious discussion."

This evidence against petitioner consisted of more than mere presence at the scene of a crime or casual association with the other conspirators. In fact the jury was not at liberty to find petitioner guilty upon the basis of fraternization alone, in view of the court's charge (R. 919) that "Mere association of one defendant with another does not establish the existence of a conspiracy." Both courts having found the evidence sufficient to support conviction, there is no occasion for further review by this Court. See *Kann* v. *United States*, 323 U.S. 88, 93; *United States* v. *Johnson*, 319

[2] Judge Frank observed that there was "not very strong evidence of attempted flight" (Pet. App. 19; see R. 180-181). While petitioner's short flight proved abortive, he certainly did everything possible under the circumstances. If the cars of the agent and the police patrol had not closed in upon his Cadillac, he might very well have escaped.

U.S. 503, 518; *Delaney* v. *United States*, 263 U.S. 586, 589-590.

2. With respect to the admission of Whitley's confession (Pet. 10-12), this Court has explicitly recognized the propriety of admitting post-conspiracy declarations against the declarant alone, if accompanied by the admonition that they are not to be considered in determining the guilt of other co-conspirators on trial at the same time. *Opper* v. *United States*, 348 U.S. 84, 95; *Lutwak* v. *United States*, 344 U.S. 604, 618, 619; *Blumenthal* v. *United States*, 332 U.S. 539, 559, 560.[3] In *Lutwak*, although cognizant of the "heavy burden" this procedure places upon jurors, the Court recognized that "the rule has nonetheless been applied". 344 U.S. at 619. Argument that the jury might have been confused about the cautionary charge "amounts to nothing more than an unfounded speculation that the jurors disregarded clear instructions of the court in arriving at their verdict. Our theory of trial relies upon the ability of a jury to follow instructions". *Opper* v. *United States*, 348 U.S. 84, 95. As Judge Medina pointed out in his concurring opinion, there is here no basis for

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[3] Accord: *United States* v. *Simone*, 205 F. 2d 480, 483-484 (C.A. 2); *United States* v. *Leviton*, 193 F. 2d 848, 856 (C.A. 2) certiorari denied, 343 U.S. 946; *United States* v. *Gottfried*, 165 F. 2d 360, 367 (C.A. 2), certiorari denied, 333 U.S. 860; *Nash* v. *United States*, 54 F. 2d 1006, 1007 (C.A. 2), certiorari denied, 285 U.S. 556; *Cwach* v. *United States*, 212 F. 2d 520, 526 (C.A. 8); *Metcalf* v. *United States*, 195 F. 2d 213, 217 (C.A. 6).

presuming that the jury did not follow the court's instructions (Pet. App. 19).

Under the circumstances of this case, the trial court did not abuse its discretion in permitting the introduction of the confession and was not "called upon to do more than give the admonition" (Pet. App. 17-18). Both Judge Hand and Judge Frank agreed that deleting the names of petitioner and Margiasso from Whitley's statement would not have helped petitioner (Pet. App. 17-18, 22). Petitioner's counsel offered no alternative procedure other than the suggested deletion just before the confession was admitted in evidence. The confession in this case was less incriminating than the statement of the sole co-defendant in *Oppet*, where this Court held that the cautionary instruction was sufficient to protect the defendant.[4]

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[4] Petitioner's reliance upon *Krulewitch* v. *United States*, 336 U.S. 440 (Pet. 10-12), is misplaced, since there the person making the confession was not a co-defendant and the confession was therefore wholly inadmissible at that trial. *Krulewitch* is a reiteration of the principle that a post-conspiracy declaration by a co-conspirator is inadmissible against other members of the conspiracy, a rule recognized by the trial judge in this case.

CONCLUSION

This case was decided in accordance with established legal principles, and there is no conflict in decisions. It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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